13- 499

No.

In the Supreme Court of the United States

IN RE SEALED CASE

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

PETITION FOR A WRIT OF CERTIORARI REDACTED VERSION

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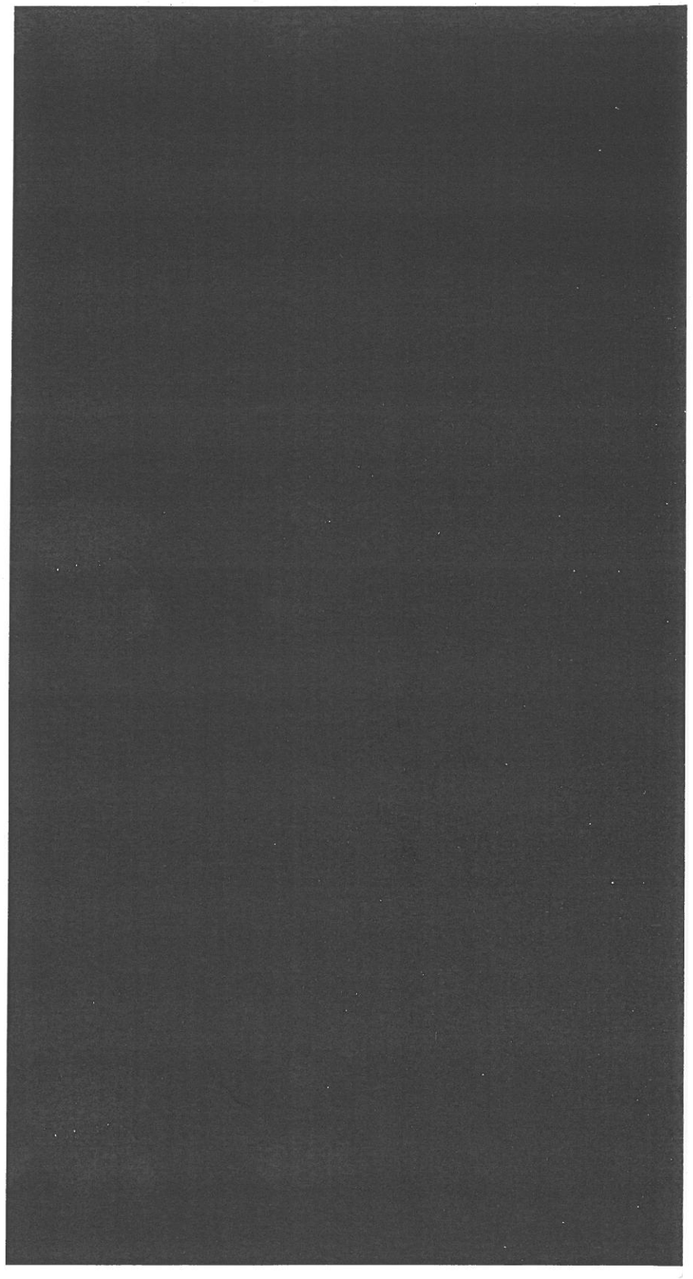

QUESTION PRESENTED

1. Whether a motion for return of property pursuant to Federal Rule of Criminal Procedure 41(g) is "solely for return of property," under *DiBella* v. *United States*, 369 U.S. 121, 131-132 (1962), such that a denial of that motion would be final and immediately appealable, where the motion seeks return of property and does not also seek suppression of evidence at a subsequent hearing or trial.

2. Whether the *Perlman* doctrine, which provides for interlocutory appeals of non-final decisions, see *Perlman* v. *United States*, 247 U.S. 7 (1918), applies to motions for return of property filed under Federal Rule of Criminal Procedure 41(g).

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases:

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ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

[redacted] respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the District of Columbia Circuit in this case.

OPINIONS BELOW

The opinion of the court of appeals (App., *infra*, 1a-16a) is reported at 716 F.3d 603. The order of the district court denying petitioner's motion (App., *infra*, 19a-37a) is unreported.

JURISDICTION

The judgment of the court of appeals was entered on March 5, 2013. A petition for rehearing was denied on April 30, 2013 (App., *infra*, 17a-18a). On July 18, 2013, the Chief Justice extended the time within which to file a petition for a writ of certiorari to and including August 28, 2013, and on August 16, 2013, he further extended the time to and including September 27, 2013. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

RULE INVOLVED

Federal Rule of Criminal Procedure 41(g) provides in relevant part:

> A person aggrieved by an unlawful search and seizure of property or by the deprivation of property may move for the property's return. The motion must be filed in the district where the property was seized. The court must receive evidence on any factual issue necessary to decide the motion. If it grants the motion, the court must return the property to the movant, but may impose reasonable conditions to protect access to the property and its use in later proceedings.

STATEMENT

After federal agents seized more than 23 million pages of documents [redacted], petitioner filed a motion under Rule 41(g) of the Federal Rules of Criminal Procedure for return of materials protected by the attorney-client privilege and electronic documents beyond the scope of the warrants. The district court denied the motion, and petitioner appealed; the court of appeals dismissed the appeal for lack of appellate jurisdiction.

The court of appeals' decision warrants review for two independent reasons. *First*, under *DiBella* v. *United States*, 369 U.S. 121, 131-132 (1962), a denial of a motion for return of property is final and appealable under 28 U.S.C. 1291 "[o]nly if the motion [1] is solely for return of property and [2] is in no way tied to a criminal prosecution *in esse* against the movant." At least three courts of appeals (the Sixth, Ninth, and Tenth Circuits), drawing on the express language in *DiBella*, have held that a motion is "solely for return of property" under *DiBella*'s first prong where it seeks return of property and does not also seek suppression of evidence in a subsequent hearing or trial, a position also endorsed by the leading treatise, see 15B Charles Alan Wright et al., *Federal Practice and Procedure*, § 3918.4, at 489 (West 2012). The court of appeals below, however, rejected that view ("the question is more fundamental than whether the movant seeks to suppress evidence," App., *infra*, 8a) and minted its own new test: a motion is "solely for return of property" where it is not "being used for strategic gain at a future hearing or trial." *Ibid.* Thus, notwithstanding that petitioner's motion does not seek suppression of evidence (a point the decision below recognizes, *id.* at 9a), and would have satisfied the test in the Sixth, Ninth, and Tenth Circuits, the court of appeals below concluded that petitioner's motion failed the first prong of *DiBella*. This conflict among the courts of appeals on a question of federal jurisdiction warrants this Court's review.

Second, even if the district court's decision were not final under *DiBella*, appellate jurisdiction was proper under the *Perlman* doctrine. See *Perlman* v. *United States*, 247 U.S. 7 (1918). In reaching a contrary conclusion, the court of appeals carved out an exception to the *Perlman* doctrine for motions for return of property, holding that the *Perlman* doctrine "cannot be stretched to cover appeals from denials of Rule 41(g) motions." App., *infra*, 12a. That decision conflicts with the holding of at least one other court of appeals, which has relied upon the *Perlman* doctrine to exercise appellate jurisdiction over a motion for return of property. And the reasoning of the court of appeals—which relies on this Court's recent decision in *Mohawk Industries* v. *Carpenter*, 558 U.S. 100, 113 (2009)—conflicts with the more limited reading of *Mohawk Industries* adopted by other courts of appeals. Those conflicts provide an additional basis for this Court's review.

1. [redacted] as part of an investigation [redacted], the government executed search warrants at [redacted]. During the search [redacted], counsel for petitioner attempted to obtain a copy of the warrant to determine whether the government was seizing items beyond the scope of the warrant. Government counsel refused to provide a copy of the attachment purporting to particularize the items the government was authorized to seize. Government counsel advised petitioner's counsel that the attachment was under seal. Petitioner's counsel objected to the search. D. Ct. Mot. 3; App., *infra*, 20a-21a.

After the government completed the search [redacted], one of the case agents provided the warrants and the attachments to petitioner's counsel. Both warrants authorized the seizure of documents related to [redacted] the investigation. D. Ct. Mot. 3; App., *infra*, 20a-21a.

During the seizures, the agents seized more than sixty boxes of documents, as well as computers, hard drives, and other devices. All told, the government seized more than 23 million pages of documents. The vast majority of the seized records have nothing to do with [redacted], but relate to confidential client matters, the operation of [redacted] business, and petitioner's personal matters. Included in the seized records are privileged communications. D. Ct. Mot. 3; App., *infra*, 20a-21a.

2. [redacted], petitioner and the government met and conferred in an effort to negotiate the return of privileged documents and of documents beyond the scope of the warrants. D. Ct. Mot. 5; App., *infra*, 20a-21a. The parties' disagreements centered around two issues: first, whether the government would be permitted to use a "filter team" (sometimes called a "taint team" or "dirty team") of government prosecutors and investigators walled off from the investigation team to review documents petitioner identifies as privileged, prior to a judi-

cial determination of whether privilege applies, to determine whether it agrees with the privilege assertions and to assist the government in litigating any privilege disputes. See, *e.g.*, *In re Grand Jury Subpoenas*, 454 F.3d 511, 516 (6th Cir. 2006). And second, with respect to electronic documents, whether the government investigation team would be permitted to review seized electronic records beyond the scope of the warrants. See, *e.g.*, *United States* v. *Comprehensive Drug Testing, Inc.*, 621 F.3d 1162, 1177 (9th Cir. 2010); D. Ct. Mot. 5-7; App., *infra*, 20a-21a.

3. Unable to resolve the disputes regarding the return of petitioner's privileged documents and his electronic records beyond the scope of the warrants, petitioner moved, under Rule 41(g) of the Federal Rules of Criminal Procedure, for the return of those privileged documents and electronic records.

The district court denied petitioner's Rule 41 motion for return of property. That court's order permitted a "filter team" of government prosecutors and investigators to review the documents petitioner identifies as privileged, prior to a judicial determination of whether the privilege applies, to determine whether it agrees with the privilege assertions and to assist the government in litigating any privilege disputes. The district court recognized that the use of the "filter team" would violate the confidentiality of petitioner's attorney-client communications, but held that this intrusion was "not so substantial as to render the use of the filter team illegitimate." App., *infra*, 32a.

The district court likewise refused to require a screening mechanism to ensure the return of electronic records beyond the scope of the warrants. According to the district court, "the government is authorized to search through the entire subset of documents returned

following an appropriate keyword search." App., *infra*, 36a.[1] Although the district court recognized that permitting the government to proceed on that basis would result in the government examining documents it had no probable cause to seize, the district court held that the "government need not employ a third-party filter team or waive reliance on the plain view doctrine in order to conduct its investigation of the subset of potentially relevant documents returned in its keyword search." *Ibid.*

4. Petitioner appealed. After oral argument, petitioner and the government reached an agreement providing petitioner the relief he sought as it pertained to the privileged documents; the court of appeals accordingly dismissed that portion of petitioner's appeal as moot, leaving the dispute regarding the scope-review of the electronic documents as the only live issue. As to the remaining issue of the scope-review of the electronic documents, the court of appeals dismissed the appeal for lack of appellate jurisdiction. According to the court of appeals, the district court's order was not final, as required by 28 U.S.C. 1291, and the court did not possess jurisdiction over the interlocutory appeal under the *Perlman* doctrine. App., *infra*, 1a-16a.

a. In considering finality under 28 U.S.C. 1291, the court of appeals applied the two-part test set forth in *DiBella* v. *United States*, 369 U.S. 121, 131-132 (1962): a denial of a motion for the return of property is final and appealable "'[o]nly if the motion [1] is solely for return of property and [2] is in no way tied to a criminal prosecution *in esse* against the movant.'" App., *infra*, 6a (quoting *DiBella*, 369 U.S. at 131-132 (footnote omitted)). On

[1] The government never disclosed its proposed keywords to petitioner or, as far as the record reveals, to the district court.

the court of appeals' view, petitioner failed to satisfy the first prong—*i.e.*, to show that his motion is "solely for return of property." *Ibid.*

Petitioner's motion was not "solely for return of property," the court of appeals reasoned, because the motion was "an integral part of a trial strategy." App., *infra*, 6a. The court of appeals rejected petitioner's argument that "the test for whether a motion is 'solely for return of property' turns on whether the motion also seeks suppression." *Id.* at 7a. "[Petitioner] cannot be right," the court of appeals explained, because although "Rule 41 has since been amended and does not automatically result in suppression," *id.* at 7a & n.6, "at the time the Court decided *DiBella*, the dichotomy [petitioner] imagines did not exist: granting a Rule 41(g) motion *automatically* resulted in suppression of the returned evidence," *id.* at 7a. The relevant "question is more fundamental than whether the movant seeks only to suppress evidence"; rather "[t]he question is whether a Rule 41(g) motion is being used for strategic gain at a future hearing or trial." *Id.* at 8a. Thus, although the "motion[] do[es] not, by [its] terms, seek suppression of evidence," the motion is not solely for return of property because it is "part of a strategy of how best to respond to a grand jury investigation." *Id.* at 9a.

b. The court of appeals next addressed petitioner's argument that the *Perlman* doctrine supplies appellate jurisdiction. "[T]he *Perlman* doctrine," the court of appeals explained, "permits appeals from some decisions that are not final but that allow the disclosure of property or evidence over which the appellant asserts a right or privilege." App., *infra*, 10a. According to the court of appeals, however, "the *Perlman* doctrine cannot be stretched to cover appeals from denials of Rule 41(g) motions." *Id.* at 12a. Rather, "*DiBella* is the exclusive test

for determining whether we have jurisdiction over appeals from orders denying Rule 41(g) motions." *Id.* at 14a.

c. Judge Kavanaugh concurred. He wrote separately to make clear that the court of appeals' decision "does not foreclose interlocutory appellate jurisdiction under *Perlman* when (i) the underlying action is not a Rule 41(g) motion for return of property and (ii) the party whose documents were seized raises an attorney-client privilege objection." App., *infra*, 16a.

5. Petitioner moved for rehearing, which the court of appeals denied without recorded dissent. App., *infra*, 17a-18a.

REASONS FOR GRANTING THE PETITION

This Court should grant the petition for certiorari for two independent reasons. *First*, the court of appeals' determination that petitioner's motion is not "solely for return of property" and thus fails *DiBella*'s first prong conflicts with the decisions of the Sixth, Ninth, and Tenth Circuits, as well as with *DiBella* itself. *Second*, the court of appeals' holding that *DiBella* precludes application of the *Perlman* doctrine to Rule 41 motions conflicts with the decisions of other courts of appeals and with this Court's own precedents.

A. The Court of Appeals' Holding That The Motion Is Not "Solely For Return Of Property" Conflicts With Decisions Of Other Circuits And *DiBella*

This Court in *DiBella* explained that the denial of a Rule 41 motion for return of property should be viewed as independent, and thus final and appealable under 28 U.S.C. 1291, where "the motion [1] is solely for return of property and [2] is in no way tied to a criminal prosecution in esse against the movant." 369 U.S. at 131-132. At issue here is the first prong of that test.

1. In direct conflict with the decision below, the Sixth, Ninth, and Tenth Circuits have held that a Rule 41 motion is "solely for return of property"—and thus meets *DiBella*'s first prong—where the motion seeks return of property and does not also seek to suppress evidence in a subsequent criminal proceeding. The court of appeals below disagreed, explaining that "[t]he question is more fundamental than whether the movant seeks only to suppress evidence"; rather, "[t]he question is whether a Rule 41(g) motion is being used for strategic gain at a future hearing or trial." App., *infra*, 8a.

a. The court of appeals' decision directly conflicts with the decisions of the Tenth Circuit. Under the Tenth Circuit's approach, a Rule 41 motion is final where the motion on its face seeks return of property and does not seek suppression of evidence. *Blinder, Robinson & Co.* v. *United States*, 897 F.2d 1549, 1554 (10th Cir. 1990); *Kitty's East* v. *United States*, 905 F.2d 1367, 1370 (10th Cir. 1990). In adopting that position, the Tenth Circuit relied on the 1989 amendments to Rule 41, and explained that "[b]ecause the effect of a successful motion for the return of property under the former Rule 41(e) was to suppress its use as evidence in any subsequent criminal proceeding * * * such a motion was properly appealable only where it was truly a motion for the return of property unrelated to a pending criminal proceeding." *Blinder*, 897 F.2d at 1554. But that changed, according to the Tenth Circuit, with the passage of the 1989 amendments, which "deleted the language of the former rule providing that the property returned pursuant to a successful Rule 41(e) motion would 'not be admissible in evidence at any hearing or trial.'" *Id.* (quoting pre-1989-

amendment version of Rule 41).[2] This change, the Tenth Circuit explained, made "th[e] determination" whether the motion was solely for return of property "much easier": because the 1989 amendments separated the return of property from suppression of evidence, courts no longer are required to discern the essential purpose of a motion; rather, the motion is solely for return of property so long as it does not also seek suppression. *Id.*; *Kitty's East*, 905 F.2d at 1370. In the Tenth Circuit, therefore, petitioner's motion would satisfy *DiBella's* first prong because, as even the decision below recognized, petitioner's motion does not seek suppression.

b. The Sixth and Ninth Circuits, although not staking out positions with as much clarity as the Tenth, also would hold that petitioner's motion satisfies *DiBella*'s first prong. In contrast to the Tenth Circuit, both the Sixth and the Ninth Circuits have demonstrated a willingness to look beyond the face of a Rule 41 motion, even after the 1989 amendments, to discern the essential purpose of the motion. But neither has adopted the "strategic gain at a future hearing" test applied by the court of appeals below.

[2] Prior to 1989, Rule 41 (then Rule 41(e)) provided that "'[i]f the motion is granted the property shall be restored and it shall not be admissible in evidence at any hearing or trial.'" *Blinder, Robinson & Co.* v. *United States*, 897 F.2d 1549, 1553 (10th Cir. 1990) (emphasis omitted) (quoting Fed. R. Crim. P. 41(e) (subsequently amended)). In 1989, however, Rule 41 was amended to provide that "[i]f the motion is granted, the property shall be returned to the movant, although reasonable conditions may be imposed to protect access and use of the property in subsequent proceedings." Fed. R. Crim. P. 41(g). According to the Committee notes, the language requiring suppression was deleted because "it has not kept pace with the development of exclusionary rule doctrine and is currently only confusing," and thus "the scope of the exclusionary rule [going forward] is [to be] reserved for judicial decisions." Fed. R. Crim. P. 41(g) advisory committee notes (1989 amends.).

Under the Ninth Circuit's rule, "[e]ven if [Rule 41] motions * * * do not lead directly to the suppression of evidence," they will be deemed not to be solely for return of property where they "require the Courts of Appeals to scrutinize the legality of searches." *In re 3021 6th Ave. North*, 237 F.3d 1039, 1041 (9th Cir. 2001). "[S]uch a motion," the Ninth Circuit has explained, is not solely for the return of property, because it "presents an issue that is involved in and will be part of a criminal prosecution in process at the time the order is issued." *Id.* (internal quotation marks omitted). Because petitioner's motion here does not "require the Court[] of Appeals to scrutinize the legality of [the] searches," *id.*, that motion would satisfy *DiBella*'s first prong under the Ninth Circuit's standard as well.

The test in the Sixth Circuit is even more permissive than that of the Ninth. Although the Sixth Circuit has stated that it would "look behind" the Rule 41 motion to its purpose in certain circumstances, *Shapiro* v. *United States*, 961 F.2d 1241, 1244 (6th Cir. 1992), the court has subsequently clarified that, where the motion on its face does not seek suppression, and where the movant represents that the motion seeks return of property, the court need look no further—the motion will satisfy *DiBella*'s first prong even if the "movant alleges an unlawful search" as the basis for seeking return. *Frisby* v. *United States*, 79 F.3d 29, 31 n.1 (6th Cir. 1996). Petitioner's motion plainly meets that test as well.

c. The leading treatise endorses the view—adopted by the other circuits and rejected by the court of appeals below—that a motion is "solely for return of property" so long as it does not also seek suppression. According to the treatise, "[t]he 'sole purpose' test of the *DiBella* case

is satisfied so long as there is not also an express motion to suppress." 15B Charles Alan Wright et al., *Federal Practice and Procedure*, § 3918.4, at 489 (West 2012) (citing cases). As the treatise explains, a literal interpretation of *DiBella*'s first prong "between 1972 and 1989 would have made any appeal impossible, since an order restoring property also had the effect of making it inadmissible in evidence at any hearing or trial." *Id.* at 486. But "[c]ases decided during this period did not rely on this possible literal interpretation"; rather, the cases "adopted a 'primary purpose' test that allowed appeal if return of property was the primary purpose of the motion and denied appeal if it were not." *Id.* at 487-488 (footnote omitted). "The 1989 form of Rule 41[] should resolve the problem." *Id.* at 488-489. Under the amended rule, "[r]eturn of property can be sought even though the seizure was lawful, conditions can be imposed to ensure that there is no interference with evidentiary use of the property in later proceedings, and return is no longer coupled with suppression." *Id.* at 489. Thus, "[t]here is no longer any need to unravel the purpose of the motion." *Ibid.* The motion should be deemed solely for return of property "so long as there is not also an express motion to suppress." *Ibid.*

d. *DiBella* itself also supports the view, taken by the other courts of appeals, that a motion is "solely for return of property" where it does not seek suppression in a subsequent hearing or trial. The movants in *DiBella* expressly sought suppression of evidence, 369 U.S. at 131, and throughout its opinion, the Court made clear that suppression—not "strategic gain at a future hearing," App., *infra*, 8a—served as the touchstone.

The Court in *DiBella*, for example, explained that "*ruling on the admissibility of a potential item of evidence* in a forthcoming trial" could not be regarded as

"the termination of an independent proceeding." 369 U.S. at 129 (emphasis added). The Court further explained that Rule 41 "*motion[s] seeking the suppression of evidence* at a forthcoming trial" are not independent of the criminal trial, because the motion's "disposition * * * will necessarily determine the conduct of the trial and may vitally affect the result." *Id.* at 127 (emphasis added; internal quotation marks omitted). And the Court approved the lower court "opinions [that] manifest a disinclination to treat as separate and final *rulings on the admissibility of evidence*." *Id.* at 128 (emphasis added).

The Court continued: "*An order granting or denying a pre-indictment motion to suppress* does not fall within any class of independent proceedings otherwise recognized by this Court, and there is every practical reason for denying it such recognition." 369 U.S. at 129 (emphasis added). "To regard such a disjointed ruling *on the admissibility of a potential item of evidence in a forthcoming trial* as the termination of an independent proceeding, with full panoply of appeal and attendant stay, entails serious disruption to the conduct of a criminal trial." *Id.* (emphasis added). "Furthermore," the Court explained, the "appellate intervention makes for truncated presentation of *the issue of admissibility*, because *the legality of the search* too often cannot truly be determined until the evidence at the trial has brought all circumstances to light." *Id.* (emphasis added).

2. The sole post-1989 amendment decision that could lend support to the decision below is *In re Grand Jury*, 635 F.3d 101, 104-105 (3d Cir. 2011). The court of appeals there held that because the movant "request[ed] * * * any *copies* of the seized documents and * * * an order directing the government to cease inspecting the evidence pending a ruling," the motion was not "solely for

the return of property." *Id.* at 104-105 (internal quotation marks omitted). In contrast to petitioner here, however, the movant there expressly sought suppression of the materials in subsequent criminal proceedings, *ibid.*, which readily distinguishes that case from the decision below. But even assuming *In re Grand Jury* should be placed on the same side of the conflict as the decision below, that leaves the decision under review on the short end of a 3-2 circuit split on a question of federal jurisdiction, with the leading treatise siding with the long end of the split. That conflict warrants this Court's review.

B. The Court of Appeals' Holding That The *Perlman* Doctrine Does Not Apply To Rule 41 Motions Conflicts With The Decisions From Other Courts Of Appeals And Precedents From This Court

In rejecting petitioner's alternative basis for jurisdiction under the *Perlman* doctrine, the court of appeals carved out an exception to that doctrine for motions for return of property. That decision conflicts with the holding of at least one other court of appeals, which relied upon the *Perlman* doctrine to exercise appellate jurisdiction over a motion for return of property. And the reasoning of the court of appeals—which relies on this Court's recent decision in *Mohawk Industries* v. *Carpenter*, 558 U.S. 100, 113 (2009)—conflicts with the more limited reading of *Mohawk Industries* adopted by other courts of appeals.

1. In *In re Berkley and Co.*, 629 F.2d 548 (1980), the Eighth Circuit considered a Rule 41 motion brought by Berkley concerning documents that had been seized by the government pursuant to a search warrant. *Id.* at

550.[3] Berkley contended that the documents contained attorney-client privileged material, and Berkley filed a motion pursuant to Rule 41 to require the government to return the seized material. *Id.* The district court ruled against Berkley, and Berkley appealed. *Id.* The government there, as here, contended that the appellate court lacked appellate jurisdiction. *Id.* at 550-551.

The Eighth Circuit rejected the government's submission, explaining that "[t]he district court's order rejecting Berkley's claim of privilege and ordering disclosure of documents to the grand jury is the functional equivalent of an order denying a motion to quash a grand jury subpoena." *Id.* The court thus held that Berkley's appeal "falls within the rationale of the Perlman doctrine." *Id.* at 551. The court acknowledged that, "[i]f the documents had been sought by grand jury subpoena directed to Berkley," the *Perlman* doctrine would not have permitted an immediate appeal because "Berkley could have protected its claim of privilege by refusing to comply and by appealing any order holding it in contempt." *Id.* at 551-552. But because, "as a result of * * * the seizure pursuant to search warrant, the allegedly privileged documents are * * * in government custody," Berkley does not have the option of "securing appellate review in contempt proceedings." *Id.* at 552. "In these circumstances," the Eighth Circuit held, "immediate appeal is authorized." *Ibid.* (citing *Perlman*).

In direct conflict with the Eighth Circuit's decision, the court of appeals below held that "*DiBella* is the exclusive test for determining whether we have jurisdiction

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[3] The motion also concerned documents in government custody, which the government obtained from a former employee who allegedly stole the documents. See 629 F.2d at 550.

over appeals from orders denying Rule 41[] motions," App., *infra*, 14a, and that "the *Perlman* doctrine" thus "cannot be stretched to cover appeals from denials of Rule 41[] motions," *id.* at 12a.[4] This conflict among the courts of appeals warrants this Court's review.

2. To reach its conclusion, the court of appeals relied upon "the admonition" from this Court in *Mohawk Industries* v. *Carpenter*, that "'the class of collaterally appealable orders must remain narrow and selective in its membership.'" App., *infra*, 15a (some internal quotation marks omitted) (quoting *Mohawk Industries*, 558 U.S. 100, 113 (2009)). But the *Perlman* doctrine is distinct from the collateral-order doctrine, see, *e.g.*, *Berkley*, 629 F.2d at 551, and any admonition from this Court as to the latter has no bearing on the former.

In contrast to the court of appeals below, other circuits have rejected such an expansive reading of *Mohawk Industries*. The Third Circuit, for example, "decline[d] to hold that the Supreme Court [in *Mohawk Industries*] narrowed the *Perlman* doctrine—at least in the grand jury context—*sub silentio*," given that the Court in *Mohawk Industries* "did not discuss, mention, or even cite *Perlman*." *In re Grand Jury*, 705 F.3d 133, 145-146 (2012). That *Mohawk Industries* did not mention *Perlman*, the court continued, "is not that surprising given that the *Perlman* doctrine and the collateral order doctrine recognize separate exceptions to the general rule of finality under § 1291." *Id.* at 146; see also *United*

[4] In reaching this conclusion, the court of appeals stated that petitioner "points us to no court that has relied upon *Perlman*'s 'Delphic' language to permit an appeal from the denial of a Rule 41[] motion, and we will not be the first to do." App., *infra*, 12a. Petitioner, however cited *In re Berkley* in its papers before the court of appeals. See Pet. C.A. Reply Br. 10.

States v. *Krane*, 625 F.3d 568, 572 (9th Cir. 2010) (explaining that "*Perlman* and *Mohawk* [*Industries*] are not in tension[;] [w]hen assessing the jurisdictional basis for an interlocutory appeal, we have considered the *Perlman* rule and the *Cohen* collateral order exception separately, as distinct doctrines"). The opportunity to correct the court of appeals' misreading of this Court's decision in *Mohawk Industries* provides an additional reason to grant certiorari here.

In short, no other court of appeals of which petitioner is aware has read *DiBella* as the court of appeals does here, effectively to overrule the *Perlman* doctrine as applied to motions for return of property. And at least one other court of appeals has held to the contrary. That is not surprising, given that *DiBella* itself cited *Perlman* with approval. *DiBella*, 369 U.S. at 124 n.2. It would be surprising, by contrast, if *DiBella* had overruled that application of *Perlman* more than a half-century ago, and the court of appeals below were the first to notice.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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